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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 338

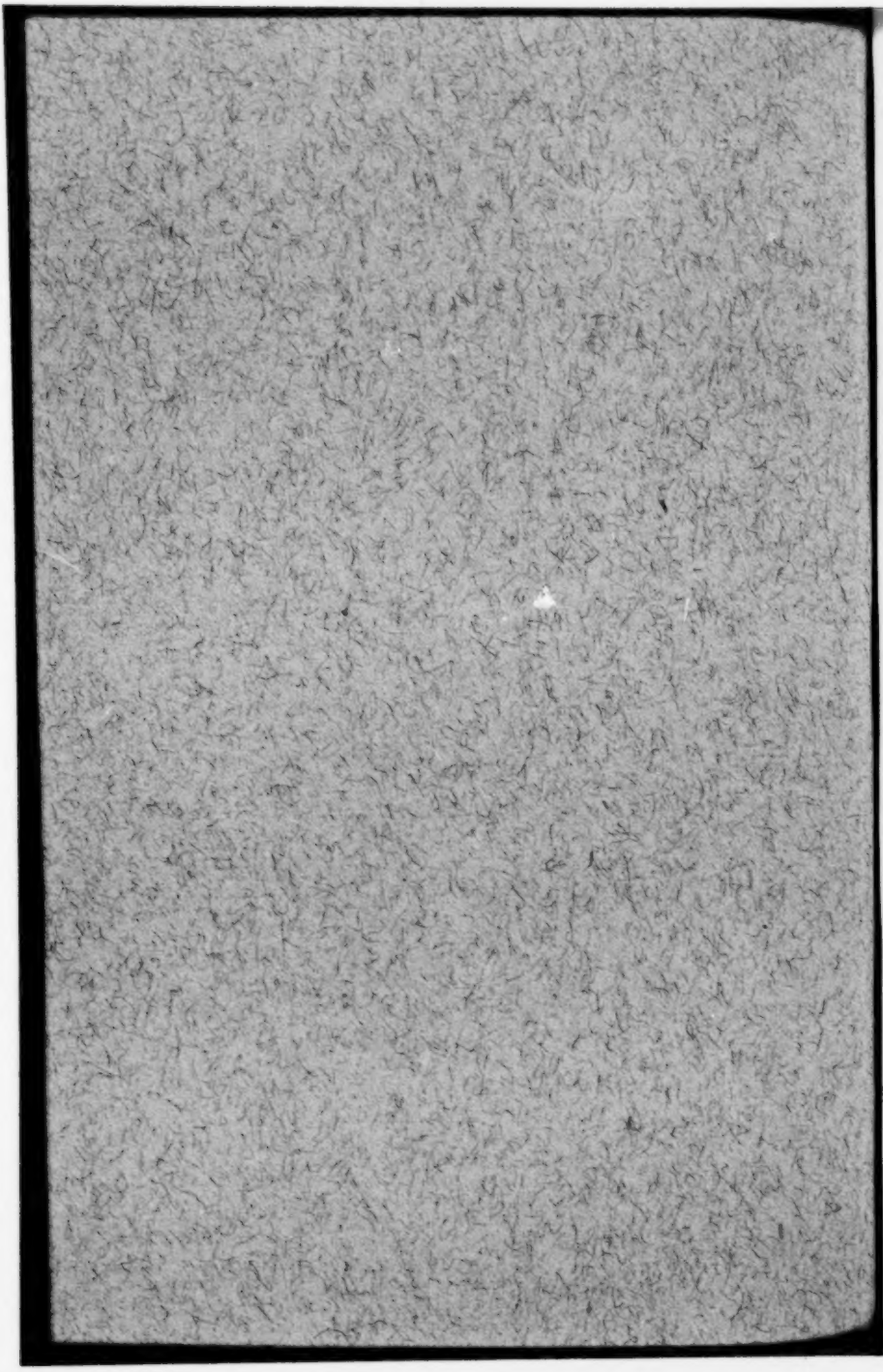
FRANK A. BERRY AND MILLER WALTON,
Petitioners,

vs.

C. J. ROOT, FIDUCIARY COUNSEL, INC., AUGUSTUS T. ASHTON, E. B. CONNOLLY, PARKER MAXWELL, AND THE UNKNOWN HOLDERS OF $42,000 PAR VALUE OF BONDS SOUGHT TO BE AFFECTED BY THE SO-CALLED PLAN OF COMPOSITION

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

MILLER WALTON,
On His Own Behalf and as Attorney for his Co-petitioner.



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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Petitioners, Frank A. Berry and Miller Walton, respectfully show the Court:

I

Summary Statement

Note: The complete record is comprised of two Court of Appeals records numbered 10605 and 11174. References to them are by record number and page therein.

Petitioners seek review of a decision[1] (11174, pp. 63-68 that the Bankruptcy Act did not adopt the "equity precedents and practices" authorizing allowances of costs "as between solicitor and client," and a court of bankruptcy lacks jurisdiction to award solicitors' fees as equitable costs.

Petitioners are the attorneys who represented the successful appellants in *Wright* v. *Coral Gables,* 5 Cir., 137 F. 2d 192, and on certiorari, represented the successful respondents in *Coral Gables* v. *Wright,* 320 U. S. 729, 321 U. S. 753, 322 U. S. 768.

After the mandate of this Court was filed in the District Court (11174, pp. 13-15), petitioners submitted a petition (11174, pp. 21-34), which the District Court denied (11174, p. 50), and refused leave to amend (11174, p. 49), praying an award of attorneys' fees as equitable costs "as between solicitor and client." The allowance was sought on the basis that in acting successfully for two members of an affected class of creditors, petitioners conferred on the other members, who stood by awaiting the outcome, and had accepted, direct benefits of the value of approximately $250,000; and it was only right, just and equitable that they be compensated by all who benefited from the services (11174, pp. 21-34).

The class was comprised of minority creditors who did not accept, and most of whom vigorously opposed in the District Court, the so-called plan of composition, but all of whom became bound by the interlocutory decree of confirmation (10605, pp. 1829-1834), which scaled their claims proportionately, materially impaired their value, enjoined their enforcement, and constructively converted them into less valuable claims of smaller amounts (11174, pp. 21-34). The reason why they comprised the class is that the plan was initiated and fully completed as a voluntary, extra-

[1] *Berry* v. *Root,* 5 Cir., 148 F. 2d 945.

judicial plan of refunding and individual settlements, with the result that before the attempt to re-adopt and submit it to the District Court as a so-called plan of composition, all securities and money offered the majority creditors had been delivered to and accepted by them, and it was not proposed that their rights be adjusted, modified, changed or altered, in any respect; the sole object of the proceeding having been to "bludgeon into submission" the minority "with whom the city had not been able to make settlements satisfactory to itself."[2]

The legal services for which compensation was sought were rendered, first, in successfully prosecuting the appeals of petitioners' minority creditor clients, with the result that the Court of Appeals reversed and set aside the interlocutory decree on grounds that restored the claims not only to their former characters, but also to their former amounts, thereby materially increasing and adding to their value;[3] and, second, in successfully defending the certiorari proceeding in which the Court of Appeals decision was affirmed by equal division of this Court.[4]

The petition relied on the following underlying equities and substance, as distinguished from matters of form: The objections of petitioners' clients to confirmation of the plan contained no formal class suit allegations, nor did the clients expressly specify that they appealed in the interest of the whole class of creditors, the appeals having been in the names of only the individual clients. Nevertheless, by taking them, the clients assumed tem-

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[2] *Wright* v. *Coral Gables*, 5 Cir., 137 F. 2d 192.

[3] The claims were paid in full. Counsel for Fiduciary Counsel, Inc., and Augustus T. Ashton, so stated in his Court of Appeals Brief, and counsel for C. J. Root so stated in his oral argument to the Court of Appeals. (11174, pp. 67, 77)

[4] *Coral Gables* v. *Wright*, 321 U. S. 753, 322 U. S. 768.

porary control of the common rights of all the minority creditors and were under a duty fairly to represent those common rights, hence the appeals were, in reality and legal effect, prosecuted in a representative capacity, on behalf of the entire class. They sought no individual relief for the clients, but sought only to have the confirmation set aside. In final analysis, they were not from the denial of any individual claims of the clients, but were on the basis that every other minority creditor, as well as the clients, was wronged and injured by the confirmation. So far as the controlling issues were concerned, the rights of the clients and of the other minority creditors were inseparable. The success or failure of the appeals, and success or failure in defending the certiorari proceeding, were bound to have a substantial effect on the interests of all other minority creditors. The successful outcome vitiated and nullified the wrong and injury done all minority creditors by the interlocutory decree. The reversal and setting aside of the decree restored the claims not only to their former characters, but also to their former amounts, and added material value to the claims of all members of the class; whose inactive, non-appealing members stood by awaiting the outcome, and had demanded and accepted the benefits. In looking to substance, and not merely to form, equity should consider realistically the valuable benefits conferred, and for dominating reasons of justice, should reward petitioners for their vigilance and success in so exceptional a case (11174, pp. 21-34).

By the proffered amendment, petitioners sought to aver that no contracts for fixed fees had been made with the principal client, but he had paid them compensation that was less than a reasonable fee, and they had agreed that he be considered as settled with and discharged from further liability, but petitioners should, on their own account,

seek further payment from the other benefited creditors; and petitioners recognized that the partial compensation paid them should be credited proportionately against such reasonable fee as the Court might allow for the services (11174, pp. 45-48).

The only points considered by the District Court were its jurisdiction and the sufficiency of the petition (11174, p. 50). Without hearing any evidence, but deeming true all facts alleged, the petition was denied on the grounds: (1) the District Court, "sitting as a Court of Bankruptcy in a municipal composition proceeding does not have jurisdiction or authority to consider and grant such equitable relief," its "jurisdiction and power to award attorneys' fees" being "limited to those fees authorized by the Municipal Bankruptcy Act;" (2) "the facts alleged * * * do not entitle Petitioners to the relief asked upon equitable principles in that such benefits" as were received "were merely incidental" (11174, p. 50). The refusal of leave to amend was on the ground that the proffered amendment "would not in any wise strengthen the amended petition so as to render it adequate as a basis for the relief prayed," and would "serve no useful purpose" (11174, p. 49).

The Court of Appeals affirmed,[5] holding: (1) the petition was an effort by attorneys to obtain an allowance by the bankruptcy court "for defeating a municipal bankruptcy proceeding," the allowance to be charged proportionately against all creditors benefited thereby; (2) the "true question" was whether or not the court of bankruptcy could and should award a fee to counsel for a creditor "who obtains the dismissal of the bankruptcy proceeding," and assess the fee proportionately against all creditors of the same class, with equitable garnishments against the debtor to pay the several assessments; (3) a court of bankruptcy

[5] *Berry* v. *Root*, 5 Cir., 148 F. 2d 945.

"is not a court of equity," but is a statutory court created and governed by the Bankruptcy Act, and as to original bankruptcy proceedings, the Act "has not adopted the equity precedents and practices as to costs, including costs as between attorney and client, commonly called an allowance of attorney's fees;" (4) "The fees allowable for services in each kind of bankruptcy proceeding have been provided, and expressly or by implication others are excluded;" (5) there is no provision and no precedent for allowing a fee, to be assessed against all benefited, "for service in dismissing any form of bankruptcy proceeding;" (6) Chapter IX of the Act "carefully defines the attorney's fees that may be allowed, to be provided for in the plan of composition," and no others can be allowed; (7) Chapter IX does not provide that an attorney's fee may be allowed "for opposing and wholly defeating" a plan of composition, and "Since in a municipal composition case there is no estate or fund before the court, except what the plan may provide, it is not practical to assess one;" (8) "We understand, though it is not alleged, that because of improvement in general conditions in Florida and in the financial position of the City pending the litigation, the creditors will collect their unscaled bonds in full; but this benefit is not really due to the attorney's services so much as to the adventitious improvement in the City's finances;" (9) § 2a(18) of the Act, empowering courts of bankruptcy to "Tax costs and render judgments therefor" against "the successful party for cause," or "in part against each of the parties, * * * in proceedings under this Act," does not authorize the allowance of costs "as between solicitor and client," but is limited to "the costs fixed in the Act itself and to the usual cost allowances fixed in other applicable statutes and by the rules of the appellate courts;" (10) the proffered amendment does not

help petitioners' case; (11) when equitable costs "as between solicitor and client" are allowable, they should be sought "in the name of the party," and "Except where the law provides for a fee to be paid to *the attorney*, according to the better rule the attorney ought not to proceed for the contribution in his own name, but in the name and right of his client;" (12) "by releasing their client who employed and primarily owes them," petitioners "certainly do not strengthen their claim against others who did not employ them and ordinarily would owe them nothing, though benefiting by their services;" (13) *Sprague* v. *Ticonic Natl. Bank*, 307 U. S. 161, is not in point, because "There was no bankruptcy," and the decision was that "a court of equity" could entertain the application; (14) *Young* v. *Higbee Co.*, 324 U. S. 204, is not in point, "because it relates not to attorney's fees, but to the substantial rights of the parties to a reorganization," and the bankruptcy court was collecting and distributing assets under an "adopted plan of reorganization," and "did not dismiss the proceeding;" (15) "More nearly analogous" are the bankruptcy corporate reorganization decisions holding, although the courts had assets before them, that the provisions for fees in such proceedings are not intended to apply where the services of counsel do not produce a plan, but result in "a dismissal of the proceedings" (11174, pp. 63-68).

Petitioners submitted a petition for rehearing (11174, pp. 69-79) which was denied May 17, 1945 (11174, p. 80).

II

Statement of Jurisdiction

The jurisdiction of this Court is invoked under § 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, § 1, 43 Stat. 938 (28 U. S. C. A. § 347(a)),

conferring on this Court jurisdiction to issue writs of certiorari to review judgments or decrees of the Circuit Courts of Appeals.

The decision sought to be reviewed was rendered April 25, 1945, by the United States Circuit Court of Appeals for the Fifth Circuit [6] (11194, pp. 63-68). A petition for rehearing (11174, pp. 69-79) was deniede May 17, 1945 (11174, p. 80).

The decision of the Court of Appeals affirmed (11174, pp. 63-68) a decree by the District Court of the United States for the Southern District of Florida, that the latter lacks jurisdiction, in a municipal composition proceeding under Chapter IX of the Bankruptcy Act, to "consider and grant" a petition praying an allowance of solicitors' fees as equitable costs "as between solicitor and client," for appellate services that conferred material benefits on all members of a class of creditors. The Court of Appeals decided that the allowance was sought for "defeating" and obtaining "the dismissal" of the "municipal bankruptcy proceeding," and that the District Court lacked jurisdiction to allow compensation, as equitable costs, for those services.

The questions presented by this Petition are important and controlling jurisdictional questions that have not been, but should be, settled by this Court. They involve: (1) the scope, extent and limits of the jurisdiction "in equity" and to assess, apportion and render judgments for "costs," with which courts of bankruptcy are invested by §§ 2a and 2a(18) of the Bankruptcy Act; (2) the jurisdiction of courts of bankruptcy to tax equitable costs "as between solicitor and client," for benefits conferred on a class of creditors by successful appellate proceedings in a municipal composition proceeding under

[6] *Berry* v. *Root*, 5 Cir., 148 F. 2d 945.

Chapter IX of the Act; (3) a complete misconception of the "true question" presented, and a resulting denial of the existence of an historic equity power exercised by courts of bankruptcy in numerous well considered decisions under the Bankruptcy Acts of 1841, 1867, 1898 and 1938; (4) the decision of a significant question of the equity power of courts of bankruptcy in a way probably in conflict with controlling principles enunciated by this Court, and also in conflict with decisions by other Circuit Courts of Appeals; (5) the propriety of a petition by affected attorneys praying an allowance of equitable costs "as between solicitor and client," directly to themselves, without any application by their immediate clients.

Counsel urges that the jurisdiction of this Court to issue a writ of certiorari to review the decision of the Court of Appeals is sustained by *Lau Ow Bew* v. *U. S.*, 144 U. S. 47; *Aztec Min. Co.* v. *Ripley*, 151 U. S. 79; *Forsyth* v. *City of Hammond*, 166 U. S. 506; *Warner* v. *New Orleans*, 167 U. S. 467; *Title Guaranty & Surety Co.* v. *U. S.*, 222 U. S. 401; *American United Mut. L. Ins. Co.* v. *Avon Park*, 311 U. S. 143; *Consolidated Rock Products Co.* v. *Du Bois*, 312 U. S. 510; *Ecker* v. *Western P. R. Corp.*, 318 U. S. 448; *Group of Institutional Investors* v. *Chicago, M. St. P. & P. R. Co.*, 318 U. S. 523; *Kelley* v. *Everglades Drainage Dist.*, 319 U. S. 415; *City of Coral Gables* v. *Wright*, 320 U. S. 729; *Young* v. *Higbee Co.*, 324 U. S. 204.

III

Questions Presented

1. Do §§ 2a and 2a(18) of the Bankruptcy Act, which invest courts of bankruptcy with jurisdiction "in equity" and to "Tax costs and render judgments therefor" against "the successful party for cause," or "in part against each

of the parties, * * * in proceedings under this Act," empower a court of bankruptcy to award solicitors' fees as equitable costs "as between solicitor and client," in a municipal composition proceeding under Chapter IX of the Act, for successful appellate services that conferred valuable benefits on all members of an affected class of creditors?

2. Is the allowance of solicitors' fees as equitable costs "as between solicitor and client," in appropriate situations, a part of the historic jurisdiction "in equity" of courts of bankruptcy?

3. Does the petition present an appropriate situation for the allowance of solicitors' fees to Petitioners, as equitable costs "as between solicitor and client?"

4. Is it permissible for affected attorneys to petition for an allowance of equitable costs "as between solicitor and client," directly to themselves, without any application by their immediate clients?

IV

Reasons Relied On for Allowance of Writ

1. The decision of the Court of Appeals is in direct conflict with controlling principles enunciated by this Court in *Trustees* v. *Greenough,* 105 U. S. 527; *Randolph* v. *Scruggs,* 190 U. S. 533; *Sprague* v. *Ticonic Natl. Bank,* 307 U. S. 161; *Securities & Exchange Comm.* v. *United States R. & I. Co.,* 310 U. S. 434; *American United Mut. L. Ins. Co.* v. *Avon Park,* 311 U. S. 143; *Reconstruction Finance Corp.* v. *J. G. Menihan Corp.,* 312 U. S. 81, and *Young* v. *Higbee Co.,* 324 U. S. 204.

2. The decision sought to be reviewed was rendered by the Circuit Court of Appeals for the Fifth Circuit, and

is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *In re Lacov*, 142 F. 960, the decision of the Circuit Court of Appeals for the Third Circuit in *In re Keystone Realty Co.*, 117 F. 2d 1003, the decision of the Circuit Court of Appeals for the Fourth Circuit in *Receivers* v. *Staake*, 133 F. 717, the decision of the Circuit Court of Appeals for the Seventh Circuit in *In re Swartz*, 130 F. 2d 229, and the decision of the Circuit Court of Appeals for the Eighth Circuit in *Summers* v. *Abbott*, 122 F. 36.

3. The questions presented are important and controlling jurisdictional questions involving the scope, extent and limits of the jurisdiction "in equity" and to assess, apportion and render judgments for "costs," conferred by §§ 2a and 2a(18) of the Bankruptcy Act, that courts of bankruptcy are empowered to exercise in municipal compositions under Chapter IX of the Act, and have not been, but should be, settled by this Court.

4. By misconceiving the "true question" presented and denying the existence of the historic equity power of courts of bankruptcy to allow solicitors' fees as equitable costs "as between solicitor and client," the Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for the exercise by this Court of its power of supervision.

5. The holding of the Court of Appeals that when equitable costs "as between solicitor and client" are allowable, they should be sought "in the name of the party," and it is not permissible for the affected attorneys to petition for the allowance directly to themselves, is in direct conflict with controlling principles enunciated by this Court in *Central R. & B. Co.* v. *Pettus*, 113 U. S. 116.

V

Prayer for Writ

A certified transcript of the entire record of the case in the Circuit Court of Appeals for the Fifth Circuit accompanies this petition, in compliance with Rule 38 of this Court, and is made a part hereof by reference.

WHEREFORE, Petitioners pray that a writ of certiorari may issue out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said Court of Appeals to certify and send up to this Court a full and complete transcript of the record and proceedings of said Circuit Court of Appeals in the case numbered and entitled on its docket, No. 11174, *Frank A. Berry and Miller Walton, Appellants,* v. *C. J. Root, Fiduciary Counsel, Inc., Augustus T. Ashton, E. B. Connolly, Parker Maxwell, and the unknown holders of $42,000 par value of bonds sought to be affected by the so-called Plan of Composition, Appellees,* to the end that said cause may be reviewed and the manifest errors of said Court of Appeals may be revised and corrected, as provided by law; that upon the hearing by this Court, the judgment of said Court of Appeals may be reversed, and that such further proceedings be had herein as may be provided by law and equity.

Respectfully submitted,

MILLER WALTON,
On his own behalf and as
Attorney for his co-petitioner.

SUPREME COURT OF THE UNITED STATES

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I

The Opinion of the Court Below

The opinion of the Circuit Court of Appeals for the Fifth Circuit was rendered April 25, 1945 (11174, pp. 63-68), and is reported as *Berry* v. *Root,* 5 Cir., 148 F. 2d 945. A petition for rehearing (11174, pp. 69-79) was denied May 17, 1945 (11174, p. 80).

II

Statement of Jurisdiction

A statement of the grounds on which the jurisdiction of this Court is invoked is contained in the foregoing

Petition (pp. 7-9), and in the interest of brevity, is adopted as a part of this Brief.

III

Statement of the Case

A statement of the case is contained in the foregoing Petition (pp. 1-7), and in the interest of brevity, is adopted as a part of this Brief.

IV

Specification of Errors

The Court of Appeals erred in the following respects:

1. In affirming the orders of the District Court.

2. In deciding that the District Court lacks jurisdiction to make the allowance sought.

3. By misconceiving the "true question" presented.

4. By denying the existence of an historic equity power of courts of bankruptcy.

5. In deciding that it was not permissible for petitioners to seek the allowance directly to themselves.

V

Argument in Support of Petition

POINT I

The decision of the Court of Appeals is in direct conflict with controlling principles enunciated by this Court in *Trustees* v. *Greenough*, 105 U. S. 527; *Randolph* v. *Scruggs*, 109 U. S. 533; *Sprague* v. *Ticonic Natl. Bank*, 307 U. S. 161; *Securities & Exchange Comm.* v. *United States R. & I. Co.*, 310 U. S. 434; *American United Mut. L. Ins. Co.* v.

Avon Park, 311 U. S. 143; *Reconstruction Finance Corp.* v. *J. G. Menihan Corp.,* 312 U. S. 81, and *Young* v. *Higbee Co.,* 324 U. S. 204.

The Court of Appeals reasoned: A court of bankruptcy "is not a court of equity," but is a statutory court created and governed by the Bankruptcy Act, and as to original bankruptcy proceedings, the Act "has not adopted the equity precedents and practices as to costs, including costs as between attorney and client, commonly called an allowance of attorney's fees" (11174, p. 65), Chapter IX of the Act "carefully defines the attorney's fees that may be allowed, to be provided for in the plan of composition," and no others can be allowed (11174, pp. 66).

This Court has decided: "Courts of bankruptcy are courts of equity and exercise all equitable powers unless prohibited by the Bankruptcy Act."[7] When exercising municipal composition jurisdiction, "A bankruptcy court is a court of equity, * * * and is guided by equitable doctrines and principles except in so far as they are inconsistent with the Act * * *;" and the many cases cited "indicate the range and type of the power which a court of bankruptcy may exercise in these proceedings. *That power is ample for the exigencies of varying situations. It is not dependent upon expressed statutory provisions. It inheres in the jurisdiction of a court of bankruptcy.*"[8] "Good sense and legal tradition alike enjoin that an Act of Congress dealing with bankruptcy should be read in harmony with the existing system of equity jurisprudence of which it is a part."[9] "It is also established by sufficient authority, that where one of many

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[7] *Young* v. *Higbee Co.,* 324 U. S. 204.

[8] *American United Life Ins. Co.* v. *Avon Park,* 311 U. S. 143—Emphasis supplied.

[9] *Securities & Exchange Comm.* v. *United States R. & I. Co.,* 310 U. S. 434.

parties having a common interest in a trust fund, at his own expense takes proper proceedings to save it from destruction and to restore it to the purposes of the trust, he is entitled to re-imbursement, either out of the fund itself, *or by proportional contribution from those who accept the benefit of his efforts.*" [10] That principle applies in bankruptcy proceedings, because a petition "to have a debtor adjudged bankrupt is for the benefit of all his unsecured creditors; and a favorable decree gives them all a proportionate advantage, and the court has no power to order * * * that this advantage shall depend upon their contributing to the expenses of the suit; but any creditor may carry on the proceedings * * *; and after adjudication all may prove their debts. * * * no single creditor nor any three or four of them have a sufficient interest to enable them to undertake the conduct of the proceedings without positive loss of money if they cannot tax the expenses on the fund, for those expenses will usually exceed the dividend on their debts." [11]

The principle applied in *Randolph* v. *Scruggs, supra,* decided under the Bankruptcy Act of 1898, is that a court of bankruptcy should follow the "equity precedents and practices" and allow, as equitable costs, attorneys' fees not expressly provided for by the Act.

Trustees v. *Greenough, supra, Sprague* v. *Ticonic Natl. Bank, supra,* and *Reconstruction Finance Corp.* v. *J. G. Menihan Corp., supra,* enunciated the principles that there are at least two classes of cases in which equitable costs "as between solicitor and client" are assessed: first, where a party wrongfully brings suit and is required to bear

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[10] *Trustees* v. *Greenough,* 105 U. S. 527—Emphasis supplied.

[11] *Trustees* v. *Greenough,* 105 U. S. 527, 534, quoting with approval the opinion of Judge Lowell in *In re Jaffray,* D. C. Mass., Fed. Cas. No. 7170, 13 Fed. Cas. 284, 2 N. B. R. 452.

the burden, although there is no fund in Court; second, where a party is the beneficiary of litigation and is required to bear his share of the burden, either from a fund in Court or "by proportional contribution" to those who conferred the benefits; but the source of the power is the same in both classes—the historic power and authority of a Court exercising jurisdiction "in equity" to do equity in a particular situation.[12]

The fundamental principle affirmed by the cited decisions is that once the statutory jurisdiction of a court of bankruptcy is invoked and attaches, the Court then has broad power and jurisdiction "in equity" to grant all forms of equitable relief, and is not impotent to do justice and equity among the parties to the proceeding.

Counsel urges that the questions presented are controlled by the foregoing principles, whose application to closely analogous facts is strongly emphasized by the recent decision in *Young* v. *Higbee Co., supra.* The factual situations are parallel, except that in the cited case the appealing stockholders abandoned their appeal and "sold out" the asserted rights of their class, but in the instant case the appealing creditors, by good faith prosecution of their appeals and defense of the certiorari proceeding,

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[12] "It is true that in many cases wherein costs have been allowed to the prevailing party as between solicitor and client rather than as between party and party, they were allowed, as in *Sprague* v. *Ticonic Bank, supra,* and in our case of *O'Hara* v. *Oakland County,* 136 Fed. (2d) 152, because a fund had been brought into court by reason of the proceeding, to the benefit of the plaintiff or to the members of a class. But it is clear from the *Sprague* case and other adjudications, that the doctrine is not limited to such situations but may be invoked against one of the parties as 'fair justice' to the other will permit, and that the allowance of such costs in appropriate situations is part of equity jurisdiction of which the federal courts were given cognizance ever since the first Judiciary Act consisting of that body of remedies, procedures, and practices which theretofore had been evolved in the English Courts of Chancery." *Cleveland* v. *Second Natl. B. & T. Co.,* 6 Cir., 149 F. 2d 466.

succeeded in conferring valuable benefits on their class. In each case, the objections to confirmation contained no formal class suit allegations, the appeals were in the names of only the appealing parties and did not specify that they were in the interest of the whole class, the appeals sought no individual relief but only to have the confirmation set aside, they were not from the denial of individual claims but were on the bases that every member of the class was injured by the confirmation, the controlling issues were such that the rights of the appealing and non-appealing members of the class were inseparable, the success or failure of the appeals was bound to have a substantial effect on the interests of all members of the class, and the primary object of the appeals was to add value to the claims of all members of the class.

The decision was that, by taking their appeal, the appealing stockholders had assumed temporary control of the common rights of all members of their class and were under a duty fairly to represent those common rights; and had they done so successfully, instead of selling out, they would have added value to the claims of all members of their class. For those reasons, it was decided that the appeal was, in reality and legal effect, taken in a representative capacity, on behalf of the entire class, and the appealing stockholders should be compelled to account to the other members of their class for the proceeds of the rights they had sold.

The Court pointed out that the representative responsibility of the appealing stockholders was emphasized by the fact that they "might have been awarded compensation for their services had they succeeded in reducing the claim of the junior indebtedness to the advantage of all the preferred stockholders."

Had Petitioner's clients violated their self-imposed trust by abandoning their appeals and "selling out" the asserted

rights of their class, the other members could have invoked the equity jurisdiction of the bankruptcy court to compel an accounting. Because rights in equity are reciprocal, the converse must be true. The trust having been faithfully executed by the successful and beneficial prosecution of the appeals, the bankruptcy court does not lack jurisdiction to grant equitable relief against those who received and accepted the benefits.

POINT II

The decision sought to be reviewed is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *In re Lacov,* 142 F. 960, the decision of the Circuit Court of Appeals for the Third Circuit in *In re Keystone Realty Co.,* 117 F. 2d 1003, the decision of the Circuit Court of Appeals for the Fourth Circuit in *Receivers* v. *Staake,* 133 F. 717, the decision of the Circuit Court of Appeals for the Seventh Circuit in *In re Swartz,* 130 F. 2d 229, and the decision of the Circuit Court of Appeals for the Eighth Circuit in *Summers* v. *Abbott,* 122 F. 36.

In *In re Lacov, supra,* the Court decided that a court of bankruptcy has jurisdiction, under its general equity powers, to order the petitioning creditors to pay the expense of a receivership, where the receiver was appointed on their application which was subsequently dismissed as unfounded. The court said: "There is no express provision in the bankruptcy act, which authorizes the court of bankruptcy to compel petitioning creditors to pay the costs of a receivership under such circumstances * * *."

In *In re Keystone Realty Co., supra,* the court construed § 258 of the Act, relating to costs in corporate reorganization proceedings, and held that, because a court of bankruptcy is a court of equity, the authority to tax costs should be construed in accordance with equity principles, consequently, that the court of bankruptcy was authorized to allow attorneys' fees as equitable costs "as between solici-

tor and client." The court cited *Trustees* v. *Greenough, supra,* and *Sprague* v. *Ticonic National Bank, supra.*

In *Receivers* v. *Staake, supra,* the Court decided that attaching creditors who seized, prior to bankruptcy, property which subsequently passed into the hands of trustees in bankruptcy, were entitled to be paid reasonable fees from a fund produced by a sale of property. This was on authority of *Trustees* v. *Greenough, supra.*

In *In re Swartz, supra,* the Court decided that after confirmation of a plan of composition under former § 74, the court of bankruptcy could tax equitable costs, including attorney fees, against creditors who filed groundless claims and prosecuted them in a manner that unwarrantedly interfered with and delayed the proceeding. The Court pointed out that a composition proceeding is a proceeding in equity, and that costs not otherwise governed by statute are given or withheld, in the sound discretion of the Court, according to the facts and circumstances of the case; citing *Guardian Trust Co.* v. *Kansas City R. Co.,* 8 Cir., 28 F. 2d 233, and *Sprague* v. *Ticonic Natl. Bank, supra.*

In *Summers* v. *Abbott, supra,* the Court decided that an assignee for the benefit of creditors, on turning over the assets to a Trustee in bankruptcy, was entitled to compensation for his own services *and those of his attorneys.*

It also is noteworthy that in *Beach* v. *Macon Grocery Co.,* 125 F. 513, the Circuit Court of Appeals for the Fifth Circuit decided that all costs and "expenses" of a bankruptcy receivership should equitably be taxed against petitioning creditors who erroneously secured the appointment of the receiver. This was not an assessment of party to party costs, but of costs "as between Solicitor and client."

The decision sought to be reviewed obviously conflicts not only with the cited decisions from other Circuits, but also with the earlier decision by the same Court of Appeals.

Point III

The jurisdiction "in equity" and to assess, apportion and render judgments for "costs," conferred by §§ 2a and 2a(18) of the Act, empower a court of bankruptcy to award solicitors' fees as equitable costs "as between solicitor and client," in a municipal composition proceeding under Chapter IX of the Act, for successful appellate services that conferred material benefits on all members of an affected class of creditors.

The Court of Appeals reasoned: "The original Act and all its amendments and expansions have dealt specifically with the costs and attorney's and other fees to be allowed, and have dealt jealously with them. The fees allowable for services in each kind of bankruptcy proceeding have been provided, and expressly or by implication others are excluded" (11174, pp. 65-66). § 2a(18) of the Act does not authorize the allowance of costs "as between solicitor and lient," but is limited to "the costs fixede in the Act itself an dto the usual cost allowance fixede in other applicable statutes and by the rules of the Appellate Courts" (11174, p. 67).

That reasoning is not supported by the citation of any authority, and conflicts with the following historic facts:

(a) The Acts of 1800, 1841 and 1867 did not embody any express provision for the allowance of attorneys' fees of any character, but courts of bankruptcy nevertheless allowed them as equitable costs "as between solicitor and client," in a number of well-considered decisions,[13] which

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[13] (1868) *In re O'Hara*, D. C. Pa., Fed. Cas. No. 10465, 18 Fed. Cas. 622, 8 Am. Law Reg. (N. S.) 113; (1868) *In re Williams*, D. C. S. C., Fed. Cas. No. 17704, 29 Fed. Cas. 1324, 2 N. B. R. 83; (1869) *In re Jaffray*, D. C. Mass., Fed. Cas. No. 7170, 13 Fed. Cas. 284, 2 N. B. R. 452; (1869) *In re King*, D. C. Ind., Fed. Cas. No. 7780, 14 Fed. Cas.

practice was approved by this Court in *Trustees* v. *Greenough*, 105 U. S. 527,[14] and many of the subsequently enacted express provisions for allowances of attorneys' fees are largely declaratory of the practice so established and approved.

(b) In *Randolph* v. *Scruggs*, 190 U. S. 533, decided in 1904 under the Act of 1898, this Court followed the "equity precedents and practices" in a bankruptcy proceeding, and authorized the allowance, as equitable costs "as between solicitor and client," of attorneys' fees not expressly provided for by the Act.

(c) Under the Acts of 1841, 1867, 1898 and 1938, attorneys' fees not expressly provided for by the Acts have been allowed by courts of bankruptcy, as equitable costs

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503, 4 Biss. 319; (1869) *In re Schwab*, D. C. N. Y., Fed. Cas. No. 12498, 21 Fed. Cas. 763, 2 N. B. R. 488; (1869) *In re Mitteldorfer*, D. C. Va., Fed. Cas. No. 9675, 17 Fed. Cas. 537, 3 N. B. R. 1; (1869) *In re Montgomery*, D. C. N. Y., Fed. Cas. No. 9726, 17 Fed. Cas. 617, 3 N. B. R. 137; (1870) *In re New York M. S. Co.*, C. C. N. Y., Fed. Cas. No. 10208, 18 Fed. Cas. 155, 3 N. B. R. 627; (1871) *In re Comstock*, D. C. Mich., Fed. Cas. No. 3074, 6 Fed. Cas. 239, 5 N. B. R. 191; (1872) *In re Mansfield*, D. C. N. Y., Fed. Cas. No. 9048, 16 Fed. Cas. 659, 6 Ben. 284.

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[14] On Page 535, the Court quoted with approval the following statement by Judge Lowell: "• • • the practice under the Act of 1841 was to allow such a charge out of the assets, as I find by examining the records. My doubt was of my power in the premises under the fee bill of 26 February, 1853, 10 Stat. at L., 161, which does not appear to sanction it and does appear to be intended to cover the whole ground of taxation of costs at law and in equity and admiralty; and by the general orders, these petitions follow the rule of cases in equity in all matters of costs. Upon reflection I have concluded that the fee bill is, probably, intended to reach only taxable costs, commonly so called, and may have its full effect without being construed to take away the power of a court of equity to permit counsel fees to be taxed in those cases where a fund is in court upon or to which different parties have distinct rights or claims." The quotation is from *In re Jaffray*, D. C. Mass., Fed. Cas. No. 7170, 13 Fed. Cas. 284, 2 N. B. R. 452.

"as between solicitor and client," in many other clearly reasoned decisions.[15]

(d) The powers of courts of bankruptcy in municipal composition proceedings are "in addition to the jurisdiction otherwise exercised" by them. § 81. The "jurisdiction otherwise exercised" includes the power to "Tax costs and render judgments therefor" against "the successful party for cause," or "in part against each of the parties, • • • in proceedings under this Act." § 2a (18). They are also invested with such jurisdiction "in equity as will enable them to exercise original jurisdiction in proceedings under the Act." § 2a. The Act does not expressly limit the class or character of costs they may tax, nor prohibit the taxing of equitable costs "as between solicitor and client," and the cited authorities establish that they "are courts of equity and exercise all equitable powers unless prohibited by the Bankruptcy Act."[16]

(e) Prior to the 1938 Act, clause 18 in § 2 authorized courts of bankruptcy to "tax costs, whenever they are allowed by law, and render judgments therefor" against "the successful party for cause, or in part against each of the parties, • • • in proceedings in bankruptcy." By the 1938 Act, the phrase "whenever they are allowed by law," was stricken out as being meaningless, "because there is no law regulating costs in bankruptcy proceedings

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[15] Cases cited in footnote 13; also (1900) *In re Little River Lbr. Co.*, D. C. Ark., 101 F. 558; (1902) *In re Evans*, D. C. N. C., 117 F. 574; (1903) *Summers* v. *Abbott*, 8 Cir., 122 F. 36; (1903) *Beach* v. *Macon Grocery Co.*, 5 Cir., 125 F. 513; (1904) *Receivers* v. *Staake*, 4 Cir., 133 F. 717; (1905) *In re Lacov*, 2 Cir., 142 F. 960; (1941) *In re Keystone Realty Co.*, 3 Cir., 117 F. 2d 1003; (1942) *In re Swartz*, 7 Cir., 130 F. 2d 229.

[16] *Young* v. *Higbee Co.*, 324 U. S. 204.

and *bankruptcy courts should have the power to tax costs upon equitable principles.*" [17] And the words "under this Act" were substituted for the words "in bankruptcy," so as to encompass the various new forms of proceedings, such as arrangements, corporate reorganizations, and the like, not authorized originally by the 1898 Act.[18] One new form of proceeding is a municipal composition. It was authorized by the Act of August 16, 1937, adding Chapter X to the 1898 Act, which Chapter became Chapter IX of the 1938 Act. As applied to both the old and new forms of proceedings, clause 18 and general order 34 "are merely declaratory of the general powers of courts of equity, including courts of bankruptcy, over the allowance and apportionment of costs * * *." [19]

Therefore, counsel submits that the declared purpose of the 1938 amendment was to eliminate any conflict between the statutory authority to tax costs "whenever they are allowed by law," and the cited decisions that courts of bankruptcy are invested with jurisdiction to assess equitable costs "as between solicitor and client." The purpose was to bring clause 18 in harmony with the cited decisions, by making it clear that courts of bankruptcy are invested with "the power to tax costs upon equitable principles." The decision of the Court of Appeals, if allowed to remain in effect, will nullify that declared purpose in the Fifth Circuit, and may serve as precedent for nullifying it in other circuits.

Point IV

By misconceiving the "true question" presented, and denying the existence of the historic equity power of courts

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[17] Analysis of H. R. 12889, 74th Cong., 2d Sess. (1936) 13; House Report No. 1409 on H. R. 8046, 75th Cong., 1st Sess. (1937) 19—Emphasis supplied.

[18] 1 *Collier on Bankruptcy*, (14 Ed.) 285, § 2.70.

[19] 1 *Collier on Bankruptcy*, (14 Ed.) 287, § 2.71.

of bankruptcy to allow solicitors fees as equitable costs "as between solicitor and client," the Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for the exercise by this Court of its power of supervision.

The Court of Appeals rested its decision on the narrow technicality that the end result of the successful appellate proceedings was the dismissal of the composition petition. It thought the allowance was sought "for defeating a municipal bankruptcy proceeding," and said the "true question" was whether or not the court of bankruptcy could and should award a fee to counsel for a creditor "who obtains the dismissal of the bankruptcy proceeding" (11174, p. 65). It reasoned that Chapter IX does not authorize fees "for opposing and wholly defeating" a plan of composition (11174, p. 66), and that allowances can be made only for services that "produce or aid in producing a plan" (11174, pp. 66-68).

That reasoning subordinates substance to form. It leads ultimately to this strange conclusion: If the reversal of the interlocutory decree had resulted in an amended plan increasing the amount or value of the consideration offered in retirement of the claims, Petitioners might have been entitled to an allowance for the benefits conferred; but because the grounds of reversal necessitated the dismissal of the proceeding, and made possible the enforcement and collection of the full former amounts of the claims, Petitioners cannot be compensated for the benefits they conferred.

The fact is that the Court of Appeals misconceived the "true question." Petitioners did not seek compensation for obtaining "the dismissal of the bankruptcy proceeding," nor for "opposing and wholly defeating" the so-called plan of composition. Instead, they sought it for successful appellate proceedings that added material value to the claims of the minority creditors as a class. That is the

underlying, substantial equity, as distinguished from matters of form and technicalities.

Petitioners did not merely protect and preserve existing rights, but rather gave back to the minority creditors that which they had lost. The interlocutory decree had scaled the claims proportionately, materially impaired their value, enjoined their enforcement, and constructively converted them into less valuable claims of smaller amounts. By the successful appellate proceedings, the decree was reversed and set aside, and the claims were restored not only to their former characters, but also to their former amounts. The restoration increased and added greatly to their value. Had the decree not been reversed, the minority creditors could never have received nor collected more than the reduced amounts of the claims, notwithstanding any supposed "adventitious improvement in the City's finances." The reversal of the decree was the sole and proximate cause of their being able to enforce the claims for the former full amounts.

The Court of Appeals also failed to apply the true reason why fees are dealt with "jealously." The reason is that by disallowing or holding fees to a minimum, larger dividends to creditors are made possible. But it also is true that to attain the same end, it is the policy of courts of bankruptcy to encourage and reward a champion who makes larger dividends possible by recovering property or a fund for the benefit of creditors, or by protecting their rights and claims from spoilation at the hands of an oppressor. §64a(1) and (3).

As pointed out in several cases cited,[20] one creditor may

[20] *In re O'Hara*, D. C. Pa., Fed. Cas. No. 10465, 18 Fed. Cas. 622, 8 Am. Law Reg. (N. S.) 113, *In re Williams*, D. C. S. C., Fed. Cas. No. 17704, 29 Fed. Cas. 1324, 2 N. B. R. 83; *In re Jaffray*, D. C. Mass., Fed. Cas. No. 7170, 13 Fed. Cas. 284, 2 N. B. R. 452; *In re Little River Lbr. Co.*, D. C. Ark., 101 F. 558.

not have sufficient economic interest to justify the expense of defending the rights of his class against unjust or oppressive schemes or practices, if he must bear the entire expense, as in most cases he would lose even though he won. In the instant case, had not Petitioner's clients championed the rights of the minority creditors by obtaining the reversal and setting aside of the interlocutory decree, their claims would have continued to be worth only approximately fifty cents on the dollar, instead of their full amounts. The minority creditors would have been "bludgeoned into submission" had the interlocutory decree remained in effect. Absent success in the appellate proceedings, the non-appealing creditors could never have been put to one cent of expense, and could never have collected more than approximately fifty cents on the dollar. They are now asked to pay only their fair share of the burden *from their gains.*

Counsel urges that the misconception of the "true question," and the resulting denial of the existence of an historic equity power of courts of bankruptcy, call for the exercise by this Court of its power of supervision.

Point V

The holding of the Court of Appeals that when equitable costs "as between solicitor and client" are allowable, they should be sought "in the name of the party," and it is not permissible for the affected attorneys to petition for the allowance directly to themselves, is in direct conflict with controlling principles enunciated by this Court in *Central R. & B. Co.* v. *Pettus,* 113 U. S. 116.

All that need be said in support of this point is, first, the holding of the Court of Appeals is not buttressed with the citation of any authority, and, second, this Court has decided: "And when an allowance to the complainant is

proper on account of solicitors' fees, it may be made directly to the solicitors themselves, without any application by their immediate client." *Central R. & B. Co.* v. *Pettus, supra.*

Respectfully submitted,

MILLER WALTON,
On his own behalf and as
Attorney for his co-petitioner.

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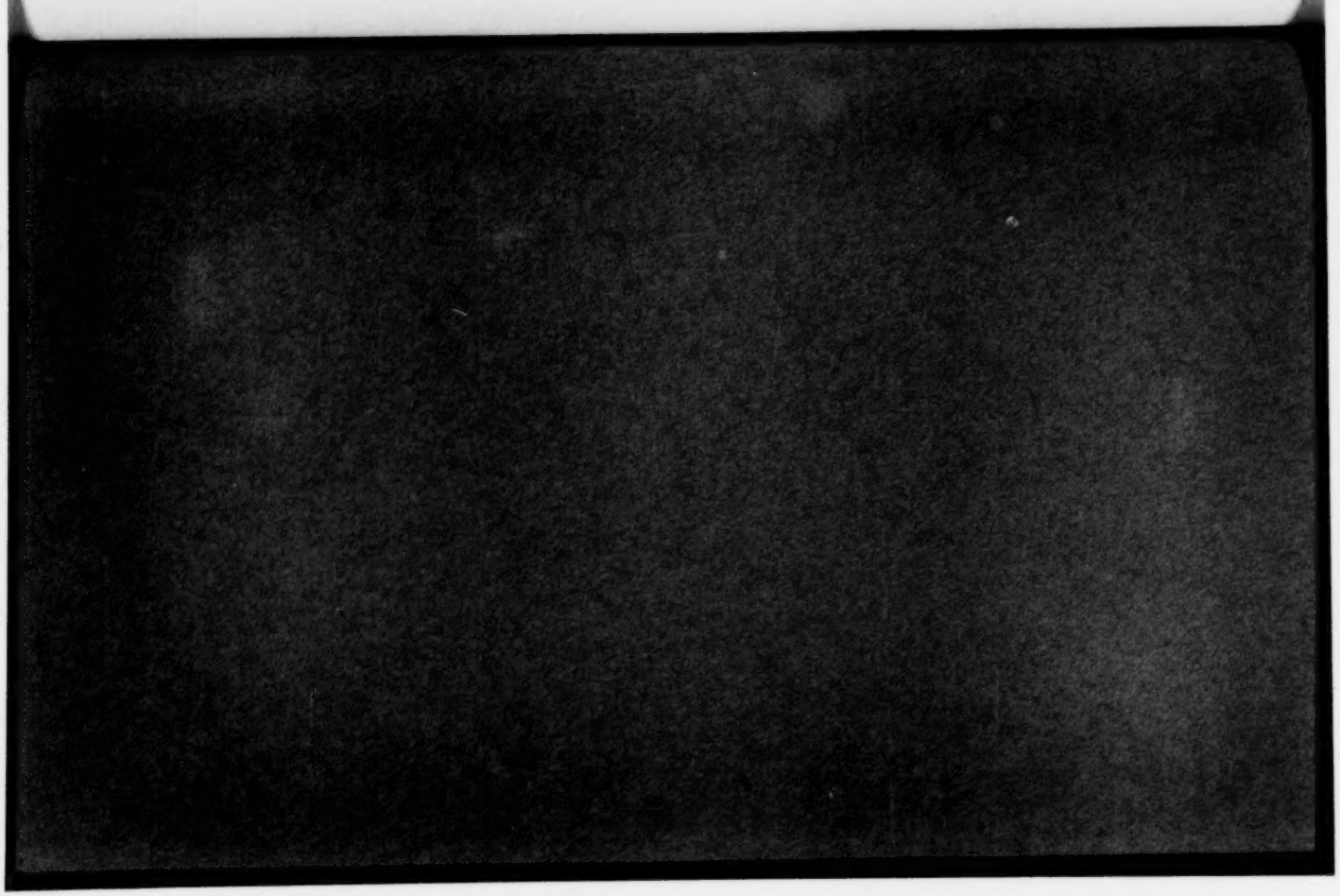

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TABLE OF CASES CITED

STATUTES CITED

RULES OF SUPREME COURT

Supreme Court of the United States

OCTOBER TERM, 1945

No. 338

FRANK A. BERRY and MILLER WALTON,
Petitioners,

vs.

C. J. ROOT, FIDUCIARY COUNSEL, INC., AUGUSTUS T. ASHTON, E. B. CONNOLLY, PARKER MAXWELL, and The Unknown Holders of $42,000 Par Value of Bonds Sought to be Affected by the So-called Plan of Composition,
Respondents.

BRIEF FOR RESPONDENT C. J. ROOT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit is reported in 148 Fed. 2d. at page 945. It is printed at R. 11174, pages 63 to 68.

No opinion was rendered by the District Court. The two orders of the District Court of which the petitioners seek review are printed at R. 11174, pages 49 to 51.

Grounds of Jurisdiction

Petitioners seek to invoke the jurisdiction of this Court under Section 240 (a) of the Judicial Code [U. S. C. A., Tit. 28, Sec. 347 (a)].

Statement of the Case

Petitioners have set forth, at pages 1 to 7 of their petition, what they call a statement of the case, but the facts are so obscured by argument and characterization that this respondent deems it best to restate the case as set forth below.

In 1940 the City of Coral Gables, Florida, instituted, in the United States District Court for the Southern District of Florida, proceedings for a composition of indebtedness under Chapter IX of the Bankruptcy Law (R. 10605, p. 1). Among the creditors whose claims were sought to be affected by the proceeding were Ed C. Wright, who was represented by the petitioner Miller Walton (R. 10605, p. 303), The American National Bank of Nashville, which was represented by the petitioner Frank A. Berry (R. 10605, p. 157), and also the various parties who are now the respondents in this application for certiorari. Certain of these respondents, including the respondent C. J. Root, were separately represented throughout the proceedings in the lower Court by counsel of their own respective choosing (R. 10605, pp. 336, 377), who were notably active and diligent, each in behalf of his own client, in opposition to the so-called Plan (R. 10605, pp. 332, 336, 377, 961, 1238, 1668, 1826, 1827; R. 11174, pp. 11, 12). There was no concert of action among the creditors; although all were creditors of the City, their claims differed in character, some holding only bonds or coupons, while others had judgments or special settlement agreements (R. 10605, pp. 121, 122, 332, 1424, 1425, 1710).

The lower Court confirmed the so-called Plan (R. 10605, p. 1829 to 1834), from which interlocutory decree the petitioners, on behalf of their respective clients, appealed to the Circuit Court of Appeals for the Fifth Circuit. None of the respondents joined in that appeal. The Circuit Court of Appeals reversed the order of the District Court and directed dismissal of the proceedings. *Wright v. City of Coral Gables,* 137 Fed. 2d. 192.

On application of the City of Coral Gables, this Court granted certiorari. *City of Coral Gables v. Wright,* 320 U. S. 729. Upon consideration of the case, the decision of the Circuit Court of Appeals was affirmed by an evenly divided Court. *City of Coral Gables v. Wright,* 321 U. S. 753. Thereafter a petition for rehearing was denied. *City of Coral Gables v. Wright,* 322 U. S. 768. None of the respondents appeared in the proceedings in this Court, except that counsel for the respondents Fiduciary Counsel, Inc., and Augustus T. Ashton filed a brief as amicus curiae.

After the mandate on reversal was filed in the District Court (R. 11174, pp. 13-15), these petitioners filed a petition in the District Court (R. 11174, pp. 21-34) seeking an allowance of attorney fees which they asked the Court to require these respondents to pay. The petition alleges that the respondents constituted a "class," and had been benefited by the appeal which had been successfully prosecuted for Ed C. Wright by the petitioner Walton.* It is conceded in petitioners' statement (page 3 of the petition), that the appeal was taken by petitioners in the names of their respective clients only, and no disclosure was made of any claim that petitioners were acting on behalf of a "class," or for the benefit of anyone other than their own

*The appeal of petitioner Berry's client, American National Bank of Nashville, was not successful—see *Wright v. City of Coral Gables,* 137 Fed. 2d. 192, headnote 1, and opinion pp. 194 to 195.

respective clients, prior to the filing of the petition referred to. The petition further alleged that the respondents had accepted the benefits of the successful appeal.

Objections to the petition, and a motion to strike were filed by this respondent (R. 11174, pp. 38 to 42). Similar motions were also filed by the City of Coral Gables (R. 11174, pp. 35 to 37) and by respondents Fiduciary Counsel, Inc., and Ashton (R. 11174, pp. 16 to 21). In addition to other objectonis which are discussed infra, it was pointed out that the petition failed to disclose what agreement had been made by petitioners with their respective clients as to payment of fees, or what if any fees had been paid them.

Petitioners then asked leave to file an amendment to their petition (R. 11174, pp. 45 to 48), in which, while still failing to disclose how much they had been paid, they alleged that Ed C. Wright (whose contract with American National Bank, they say, required him to pay the Bank's counsel fees) had paid petitioners an undisclosed sum, which they claimed was less than a reasonable fee, whereupon they released Wright, and agreed with him that they would endeavor to collect the remainder of what they claimed was a reasonable fee from these respondents.

The District Court denied the petition (R. 11174, p. 50), upon two grounds, *first* that the facts alleged did not entitle the petitioners to the relief asked, and *second* that the Court was without jurisdiction or authority to grant such relief.

The petitioners were also denied leave to file the proffered amendment, on the ground that it would in no wise strengthen the petition (R. 11174, p. 49).

It should also be noted that the District Court entered its order on the mandate finally dismissing the composition

proceedings and taxing costs (R. 11174, pp. 43 to 44), without retaining jurisdiction for any purpose, before the entry of the orders which petitioners now seek to review.

On appeal to the Circuit Court of Appeals, the orders of the District Court denying the petition for fees and refusing permission to file the amendment were affirmed (*Berry v. Root*, 148 Fed. 2d. 945; R. 11174, pp. 63-68), and a petition for rehearing was denied (R. 11174, p. 80).

A considerable part of the petition and brief of the petitioners is devoted to an analysis of the opinion of the Circuit Court of Appeals, and to an endeavor to show that the opinion of that Court was erroneous. While respondents maintain that the petitioners are mistaken, and that the Circuit Court of Appeals was right, we respectfully submit that it matters not at all whether the opinion of the Circuit Court of Appeals was in all respects, or indeed in any respects, right or wrong. This Court does not grant certiorari to review an opinion.

Furthermore, certiorari should not be granted here because it is clear that, even had the Circuit Court of Appeals reached a wrong conclusion, this is not a case for certiorari, since it is not of the character defined in Rule 38-5 (b).

Questions Presented

At pages 9 to 10 of the petition the petitioners have framed four questions which they allege are presented by this case. We submit that this record raises none of the questions so framed. This is not a case of "benefits" conferred on any "class of creditors"; Bankruptcy Courts have no "historic jurisdiction in equity"; we are not here concerned with "equitable costs"; and there is no issue as to the necessity of an application by the petitioners' clients.

The true question here is merely this:

(1) Is any public interest here involved?

If that could be answered in the affirmative (and it cannot), then these two questions would arise, viz:

(a) Did the Bankruptcy Court have power to grant the petition?

(b) If it had the power, did it abuse its discretion in denying the petition?

To answer this last question, this Court would have to apply certain well established principles, not disputed in the lower Courts, to the facts of this case, in order to determine whether the District Court abused its discretion in holding that the facts did not entitle petitioners to equitable relief. This at once demonstrates that the present case is not of the character which calls for the intervention of this Court.

ARGUMENT

Point 1. No question of public interest is involved.

The question whether a given state of facts will entitle a litigant to equitable relief is ordinarily a question which concerns only the parties to that litigation and does not involve any public interest.

So it is here. The District Court held, upon the facts alleged in the petition, that those facts were not such as to entitle the petitioners to an award of attorney fees as against these respondents.

Even if petitioners were right in their argument that the Bankruptcy Court has any general power as a court of equity to allow attorney fees as "costs as between solicitor and client" (and we show in Point 4, infra, that they are not), the ruling of the District Court that the facts do not entitle petitioners to the relief asked was an exercise of that Court's discretion, in applying the established equitable principles (including arguendo those for which the petitioners contend) to the facts of this case, and the resulting decision was therefore of a character outside the class of which this Court will take jurisdiction by certiorari.

Petitioners have cited, at page 9 of the petition, a number of cases in support of their claim that this case is of a character such that certiorari should be granted. Of the cases cited, those which are relevant (and several are not) are all cases involving important questions of substantive law or procedure, the determination of which would establish vital precedents or otherwise materially affect the public interest.

In the instant case, the petitioners, defeated in the lower Courts, are merely seeking another hearing here. This Court has not made a practice of using its power to bring up cases by certiorari for any such purpose. *Magnum Import Co. v. Coty*, 262 U. S. 159, 163.

Point 2. No conflict between Courts of Appeal is involved.

The petitioners urge that the decision of the Circuit Court of Appeals for the Fifth Circuit is in conflict with decisions in the Second, Third, Fourth, Seventh and Eighth Circuits cited at page 11 of the petition and briefly reviewed below.

No such conflict exists.

In the Second Circuit it was held, in *In Re Lacov*, 142 Fed. 960, that the Bankruptcy Court has power to protect the assets under administration by assessing against a party guilty of baseless and vexatious litigation, the counsel fees of the other parties. This is a power of a wholly different character from the fancied power to award fees for benefits conferred which these petitioners seek to ascribe to the Bankruptcy Court. Since the question involved was entirely different from that in the case at bar, there is no conflict.

In the Third Circuit, it was held, in *In Re Keystone Realty Co.*, 117 Fed. 2d. 1003, that authority is expressly granted to the Bankruptcy Court by Sec. 658, Tit. 11, U. S. C. A., to allow a fee to an attorney for services in a prior equity receivership. Incidentally, the District Court was reversed because it was not shown to be equitable to grant the allowance under the circumstances. The questions involved are quite dissimilar, so there can be no conflict.

In the Fourth Circuit, the decision in *Receivers v. Staake*, 133 Fed. 717, also involved an allowance of fees for services in prior proceedings which might well have been regarded as constituting an equitable charge on assets coming into the hands of the Trustee in Bankruptcy. This also involves no conflict with the case at bar.

In the Seventh Circuit the case of *In Re Swartz*, 130 Fed. 2d. 229, involves an allowance of counsel fees by way of penalization, along lines similar to those in *In Re Lacov*, supra., so that no conflict with that Circuit is indicated.

In the Eighth Circuit, *Summers v. Abbott*, 122 Fed. 36, is a case involving questions similar to those in *Receivers*

v. Staake, supra., which indicates no conflict with that Circuit.

It will thus be seen that the alleged conflict between Circuits which the petitioners urge is wholly non-existent.

The fancied conflict between the decision in question and the earlier Fifth Circuit case of *Beach v. Macon Grocery Co.*, 125 Fed. 513, is also non-existent. That case, like *In Re Lacov* supra., and *In Re Swartz*, supra., involved allowance of fees as penalization for vexatious litigation.

In point of fact, the decision in the case at bar is clearly in line with the following decisions in other Circuits which involve similar questions*, viz: *In Re Nine North Church St.* (2 Cir.), 89 Fed. 2d. 13; *Sartorius v. Bardo* (2 Cir.), 95 Fed. 2d. 387; *In Re Forty-One Thirty-Six Wilcox Bldg. Corp.* (7 Cir.), 100 Fed. 2d. 588; *Oakland Hotel Co. v. Crocker First Natl. Bank* (9 Cir.), 85 Fed. 2d. 959.

So far from being out of line with earlier decisions of the same Circuit, the case is very nearly on all fours with *Lea v. Paterson Sav. Inst.* (5 Cir.), 142 Fed. 2d. 932.

Point 3. This Court will not review the District Court's ruling that the facts alleged did not entitle the petitioners to the relief sought.

It should be quite clear from the face of the record that there is ample support for the decision of the District Court, in the exercise of its proper judicial discretion, that

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*These cases were decided under Section 77B as it existed before the effective date of Section 646. The provisions respecting corporate reorganizations as then existing included no express authority for allowances in case of dismissal of such proceedings. Chapter IX still includes no such authority.

the facts alleged in the petition did not entitle the petitioners to the relief sought.

The alleged benefit to the respondents of the legal services rendered by petitioners was clearly an afterthought of the petitioners which did not occur to them until after they found their own clients unwilling to pay them as much money as they thought they should have.

The appeal was taken by Ed C. Wright for his own benefit solely, and obviously without any regard to the benefits which might incidentally accrue to the respondents. Any benefits which did result were merely incidental. *Linen Thread Co. v. A. Booth & Co.*, 192 Fed. 515; *Davis v. Seneca Falls Mfg. Co.*, 17 Fed. 2d. 546; *Huff v. Bidwell*, 195 Fed. 430; *Tull v. Nash*, 141 Fed. 557; *Standard Lumber Co. v. Interstate Trust Co.*, 82 Fed. 2d. 346; *Lamar v. Hall*, 129 Fed. 79; *Lea v. Paterson Sav. Inst.*, supra.

This respondent was represented throughout the main proceedings by his own counsel. In such case it is well settled that a party so represented is required to pay only his own counsel and is not liable for the fees of any other attorney whose services may have been of incidental benefit. *Nolte v. Hudson Nav. Co.*, 47 Fed. 2d. 166; *Fletcher v. Coomes*, 52 App. D. C. 159, 285 Fed. 893; *Wilson v. Kelley*, 30 S. C. 483, 9 S. E. 523; *Howard v. Carmichael*, 237 Ky. 462, 35 S. W. 2d. 852; *Huff v. Bidwell*, supra; *Tull v. Nash*, supra; *Lea v. Paterson Sav. Inst.*, supra.

This proceeding had none of the elements of a class action, so that it is not governed by the principles which are established in the cases relied on by petitioner, in which the implied agreement of other parties to be responsible for the fees of the attorney conducting the suit for the

benefit of the class is spelled out of the acceptance of the benefits. In the instant case, the benefits were incidental only, and no significant affirmative step such as that required in *Wallace v. Fiske*, 80 Fed. 2d. 897, was required of these respondents to obtain the alleged benefits; hence no agreement to be responsible for petitioners' fees can be implied as against these respondents.

Arguing from the converse, petitioners seek to establish the class representation by alleged analogy with the situation in *Young v. Higbee Co.*, 324 U. S. 204. The stockholders there, being the holders of one class of stock in a corporate reorganization, were necessarily bound together by a community of interest, and so were held by this Court in that case to constitute a class, whereas in the case at bar the judgment creditors and bondholders of the City had no such community of interest. Without stressing that point, however, we observe that, in the cited case, the appealing stockholders, who obtained an identifiable sum of money by selling out the non-appealing stockholders, were required to account for the proceeds of the sale of property rights which did not justly belong to them. The fact that such an obligation was held to exist sheds no light on any question regarding the obligation of one party in litigation to pay the fees of another party's attorney. Logically, there is no connection whatever. The cited case does not involve any question even remotely connected with the questions in the case at bar. One may be held to the exercise of good faith in dealing with matters which affect another's interest, without thereby obligating the other to pay counsel fees. The cited case has no bearing here.

One significant point seems to have escaped the petitioners entirely. The fact that petitioners have never disclosed how much they have been paid, coupled with the

circumstances of their settlement with Ed C. Wright, may well have influenced the District Judge in holding that the facts did not "entitle petitioners to the relief asked upon equitable principles." This point was clearly of weight with the Circuit Court of Appeals, as evidenced by the statement (R. 11174 p. 67) that "These attorneys by releasing their client who employed and primarily owes them certainly do not strengthen their claim against others who did not employ them."

Petitioners have criticized the further statement in that opinion that "according to the better rule the attorney ought not to proceed for the contribution in his own name, but in the name and right of his client," and protest that this contravenes the principle announced in *Central R. Co. v. Pettus*, 113 U. S. 116. Even if they were right in this criticism, the presence of such a statement in the opinion would furnish no ground for the intervention of this Court. But the petitioners are wrong. The Circuit Court of Appeals was not so much concerned with defining a rule, whether contravening or following the rule of *Central R. Co. v. Pettus*. What that Court was stressing was the inequity of petitioners' position. Petitioners have not disclosed to the Court how much they have been paid; they have released their own client upon receipt of a sum which they claim is inadequate; and they have arranged with him that he may shift part of the burden of his obligation for the payment of the fees of his counsel onto these respondents, who were represented in these proceedings by their own attorneys and never accepted representation by the petitioners. This does not indicate a situation in which a Court would incline to use its powers of equity, if it had them, to assist these petitioners in a claim so plainly inequitable.

When all the principles of class suits have been considered and the precedents in equity which are relied on by petitioners, such as *Trustees v. Greenough*, 105 U. S. 527 and *Sprague v. Ticonic Natl. Bank*, 307 U. S. 161, have all been reviewed, it must be conceded that in the exercise of the power of a court of equity (where such power does exist) to award counsel fees for benefits conferred, the Chancellor must be satisfied with the justice and equity of the claimed award. It is plain that the District Judge was not so satisfied, and that he was affirmed in this by the Circuit Court of Appeals. This conclusion is not of a character which this Court will review, and in any event it is plain on the face of the record that there is ample support for the decision in this regard.

Point 4. The decision that the Bankruptcy Court had no power to grant the relief sought is in full accord with established precedents in this Court and in the Circuit Courts of Appeal.

Ignoring the numerous decisions which hold that the power of the Bankruptcy Court to allow counsel fees is strictly limited, petitioners have sought to ascribe to it all the broad powers of the equity courts, and thus to argue that the decision of which they seek review is in direct conflict with the principles of *Trustees v. Greenough*, supra, and other equity cases mentioned at page 10 of their petition and pages 14 to 15 of their brief.

There is no basis for this argument.

It is of course true that this Court has held, as in *Young v. Higbee Co.*, supra, and *American United Life Ins. Co. v. Avon Park*, 311 U. S. 143, cited by petitioners, that, within the limits fixed by the Bankruptcy Act, the Bank-

ruptcy Court can and must apply equitable principles, and has ample power to carry out its authorized functions within those limits. It is equally true, however, that, as this Court has also held, the Bankruptcy Court is limited in the exercise of those powers to the authority expressly granted by the Bankruptcy Act. *Callaghan v. Reconstruction Finance Corp.*, 297 U. S. 464; *Securities & Exch. Com. v. United States Realty & Imp. Co.*, 310 U. S. 434; *Taubel-Scott-Kitzmiller Co. v. Fox*, 264 U. S. 426. The Circuit Courts of Appeal have repeatedly held that the Bankruptcy Court has no powers except those expressly granted by statute and that it has none of the broad powers of a court of equity. *In Re Prima Co.* (7 Cir.), 98 Fed. 2d. 952, cert. den., *Keig v. Harris Trust & Sav. Bank*, 305 U. S. 658; *Chicago Bank of Commerce v. Carter* (8 Cir.) 61 Fed. 2d. 986; *In Re Judith Gap Commercial Co.* (9 Cir.), 5 Fed. 2d. 307. Moreover, this Court has ruled, in *Realty Asso. Sec. Corp. v. O'Connor*, 295 U. S. 295, and again in *Callaghan v. Reconstruction Finance Corp.*, supra, that the policy of the Act clearly calls for rigid economy in administration, so that the power to allow fees and expenses should not be extended by implication, remarking that one seeking award of compensation "must show clear warrant of authority."

As pointed out by the Circuit Court of Appeals in its opinion in this case (R. 11174, p. 66), the only attorney's fees which the Bankruptcy Court is empowered to allow in a municipal composition under Chapter IX are limited, in Section 403 (b), by careful definition, to fees for services in formulating and securing the adoption of a plan of composition; thus where no plan is finally approved, no fee can be allowed in a proceeding under Chapter IX.

That the petitioners seek an award as against other creditors (the respondents), and not from the City's funds,

is a distinction which benefits their claim not at all. There is no more express authority for award of fees as against creditors, where the proceedings are dismissed without approval of a plan, than there is for an award in such case as against the City.

The policy of the Bankruptcy Act, and especially of Chapters IX and X, not only tends to limit the power to allow counsel fees in general and to circumscribe the exercise of that power, but also tends to discourage claims based on alleged representation of or benefits conferred upon any class of creditors, by attorneys who first call attention to such representation or benefits after their services have been rendered. Sections 609 to 613 require notice to the Court of any claim of class representation, and full disclosure concerning arrangements for employment, before any such services are rendered in a corporate reorganization, as a condition of recognition of such representation. Section 403 (a) includes similar requirements in municipal composition proceedings. If those requirements do not absolutely forbid the Court to recognize the petitioners as representatives of an alleged class, at least they clearly show the policy of the Act to discourage such claims and limit the Court in granting such allowances.

The ruling of the District Court that it had no power to grant the allowances sought was upheld by the Circuit Court of Appeals because no express warrant therefor can be found in the statute, and the powers of the Bankruptcy Court in respect of such allowances cannot be extended by implication. This decision was clearly in line with the decisions of this Court mentioned above under this point 4, and with analogous decisions under Section 77B cited above at page 9 of this brief.

Petitioners argue that, because (they say) the Bankruptcy Court has all the broad and plenary powers of a court of equity, its power to "tax costs and render judgments therefor," which is found in Section 11 (18), Tit. 11 U. S. C. A., may be extended by implication to include a general power to allow attorney's fees "as equitable costs as between solicitor and client." This argument, being based as we have shown on a fallacious assumption as to the powers of the Court, must fail. In any event, the word "costs" as used in the statute would not include "equitable costs as between solicitor and client" because the word "costs" does not include such allowances unless expressly so stated. *Kansas City So. R. Co. v. Guardian Trust Co.*, 281 U. S. 1.

Not a single case is cited by petitioners to support their argument respecting this Section 11 (18). They have cited and reviewed a number of cases in equity which confirm the power of an equity court to allow attorney fees as "costs as between solicitor and client," such as *Trustees v. Greenough*, supra; *Reconstruction Finance Corp. v. J. G. Menihan Corp.*, 312 U. S. 81; *Sprague v. Ticonic Natl. Bank*, supra; *O'Hara v. Oakland County*, 136 Fed. 2d. 152; *Cleveland v. Second Natl. Bank*, 149 Fed. 2d. 466; and *Central R. Co. v. Pettus*, supra; but this power of the equity courts is not disputed here, and these equity cases are not in point.

Petitioners have also cited a number of cases relating to the powers of Bankruptcy Courts, but none support their argument. Several of the cited cases involve allowances under express statutory authority to be found in Title 11 U. S. C. A., such as *Smith v. Central Trust Co.*, 139 Fed. 2d. 733, which upholds an allowance under Section 646; *In Re Keystone Realty Co.*, supra, under Section

658; and various cases dealing with the allowance of fees in prior proceedings, such as *Randolph v. Scruggs*, 109 U. S. 533; *Receivers v. Staake*, supra; *In Re Little River Lumber Co.*, 101 Fed. 558; and *Summers v. Abbott*, supra.

In ordinary bankruptcy, Section 104 expressly permits allowance of certain fees on dismissal, as does also the above cited Section 646 in proceedings under Chapter X. The absence of any parallel provision in Chapter IX is significant. The existence of express authority for allowances in the cases last noted serves to emphasize the absence of any authority in such a situation as that of the petitioners.

Petitioners also cite certain cases in which the Courts have assessed counsel fees of the other parties against one guilty of vexatious litigation or unwarranted interference with the proceedings, which power, as mentioned above, stems from a different source and inheres in the authority of the Bankruptcy Court to protect its own proceedings. Of this class are *In Re Lacov*, supra; *In Re Swartz*, supra; *Beach v. Macon Grocery Co.*, supra.

The older nisi prius cases cited in the footnotes on pages 16, 21 and 22 of petitioners' brief are also not persuasive.

It is well settled, upon the authorities we have cited, that the Bankruptcy Court, has no such equity power to allow counsel fees as the petitioners argue. On the contrary, its power to allow counsel fees is closely limited. By the express provisions of Chapter IX defining the Court's powers in municipal composition proceedings, by the significant absence of other provisions as noted above, and by the policy and purposes of the Bankruptcy Law, it cannot be doubted that the lower Court had no power to grant to the petitioners the award of fees which they sought.

The decision of which the petitioners seek review is not at all out of line with the decisions of this Court and in no respect in conflict with the relevant decisions in the other Circuits. We have shown that petitioners' criticism of the opinion of the Circuit Court of Appeals is without justification, but in any event furnishes no reason why this Court should grant certorari. The lower Court was right in holding that it had no power to grant the relief sought by petitioners, and the Circuit Court of Appeals was right in affirming that decision.

Conclusion

This record presents no questions of the character defined in Rule 38-5. No new question of interpretation or application of Chapter IX of the Bankruptcy Act is involved. The petitioners are merely seeking a third hearing. No reason appears why this Court should intervene.

The application for a writ of certiorari should be denied.

Dated September 12, 1945.

Respectfully submitted,

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